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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C. 20554

MAR 19 1997

Federal Communications Commission  
 Office of the Secretary

In the Matter of ) WT DOCKET NO. 94-147  
 )  
**JAMES A. KAY, JR.** )  
 )  
 Licensee of one hundred fifty two Part 90 )  
 Licenses in the Los Angeles, California, Area )

To: Administrative Law Judge  
 Richard L. Sippel

**WIRELESS TELECOMMUNICATIONS BUREAU'S**  
**MOTION TO ENLARGE ISSUES**

1. The Chief, Wireless Telecommunications Bureau, by her attorneys and pursuant to Section 1.229 of the Commission's Rules, hereby requests that the Presiding Judge enlarge the scope of this hearing proceeding to include the misrepresentation and abuse of process issues specified below. In support whereof the following is shown.

2. This motion is being filed within 30 days of the release of Memorandum Opinion and Order, FCC 97I-06 (released February 20, 1997), which remanded this case to the Presiding Judge for a full evidentiary hearing. Moreover, the matters raised in this motion involve questions of probable decisional significance. Accordingly, this motion is properly filed.<sup>1</sup>

<sup>1</sup> Although the facts asserted herein consist of those of which official notice may be taken, an affidavit is appended hereto out of an abundance of caution. See Section 1.229(d) of the Commission's Rules.

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3. On February 17, 1995, during the discovery phase of this proceeding, the Bureau properly served on Kay its First Set of Interrogatories. Interrogatory No. 4 requested Kay to produce station-specific loading information to the Bureau. The language of the interrogatory was unambiguous:

With respect to each of the call signs listed in Appendix A of the Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing for Forfeiture, FCC 94-315 (released December 13, 1994), identify each and every "end-user" (i.e., customer) and the number of mobile units of each such "end-user" (i.e., customer) since January 1, 1991.

Kay served his answers to the Bureau's interrogatories in March 1995. Kay's answer to Interrogatory No. 4 also was succinct:

ANSWER: See Kay's response to Document Requests 4 and 5 of the Bureau's First Request for Documents.

Notably, Kay did not object to Interrogatory No. 4 when he served his answer on the Bureau. To the contrary, Kay's answer plainly implied that all of the information sought by the Bureau in Interrogatory No. 4 could and would be found among the materials that Kay had already produced and/or would produce in response to the Bureau's request for documents. In other words, Kay intended both the Bureau and the Presiding Judge to believe that (a) the information sought in fact existed, and (b) the information would be or had already been made available among the documents that Kay produced or would produce.

4. Thereafter, in good faith reliance on Kay's representations, the Bureau examined the documents that Kay had produced in an effort to ascertain the station loading information sought in Interrogatory No. 4. On May 30, 1995, after having failed to locate the loading information, the Bureau filed a motion to compel, seeking a full and complete answer to

Interrogatory No. 4.<sup>2</sup>

5. On June 12, 1995, Kay filed an opposition to the Bureau's motion to compel. Therein, he disclosed for the first time that the documents to which he had directed the Bureau in his answer to Interrogatory No. 4 did *not* contain station-specific loading information responsive to the interrogatory. Indeed, in stark contrast to his answer to Interrogatory No. 4, Kay claimed in his opposition that he did not possess or maintain station-specific loading information. Kay, however, acknowledged that he could indeed obtain the requested loading information:

It is possible that, by inquiring of his hundreds of customers, Kay could ascertain the requested information. However, given his present resources, Kay estimates that such an effort would require his full time efforts for at least 90 days, and Kay simply lacks the resources to conduct such an inquiry.

6. By Order, FCC 95M-203 (released October 31, 1995), the Presiding Judge determined that the station-specific loading information sought by the Bureau was relevant to the designated issues, and there had been no showing by Kay that requiring him to produce a comprehensive list of his loading on a station-by-station basis would be unreasonably burdensome. Accordingly, the Presiding Judge granted the Bureau's motion to compel and explicitly ordered Kay to provide a "complete answer" to Interrogatory No. 4 by November

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<sup>2</sup> In its motion to compel, the Bureau afforded Kay the benefit of the doubt when it stated at ¶ 3:

The Bureau requests the Presiding Judge to direct Kay to provide the requested accounting of the loading of his stations. If in fact Kay has already provided such a comprehensive listing among the many documents that he has heretofore submitted to the Bureau, then [the] Bureau respectfully requests, in the alternative, that the Presiding Judge order Kay to simply reference the Bates numbers where the requested listing was produced.

13, 1995. Kay submitted a further response on November 13, 1995. However, Kay's further response was inadequate. Thus, although the Presiding Judge had ordered Kay to produce loading information dating back to January 1, 1991, Kay did not provide any loading information prior to November 9, 1995. Additionally, the information that Kay produced was not reported on a station-by-station basis as the Presiding Judge had required. Moreover, Kay excluded from the information he provided certain classes of end-users that he was otherwise required to identify.

7. It is well settled that the ability of the Commission to rely on the representations of applicants and licensees is crucial to the functioning of our regulatory process. Richardson Broadcast Group, 7 FCC Rcd 1583 (1992) (subsequent history omitted). Indeed, the Commission's demand for absolute candor is itself all but absolute. Emission de Radio Balmaseda, Inc., 7 FCC Rcd 3852, 3858 (Rev. Bd. 1992), rev. denied, 8 FCC Rcd 4335 (1993). The sine qua non for a finding of disqualifying misrepresentation or lack of candor is an intent to deceive the Commission. Fox River Broadcasting, Inc., 93 FCC 2d 127, 129 (1983). Moreover, Section 1.17 of the Commission's Rules requires truthful written statements in all filings with the Commission.

8. Based on the foregoing, a substantial and material question of fact exists as to whether Kay misrepresented material facts to the Commission or lacked candor in his response to the Bureau's interrogatories. In this regard, it appears that Kay's answer to Interrogatory No. 4 (in which he explicitly directed the Bureau to certain, specific documents) was false, misleading, and intended to deceive. Kay deliberately misdirected the Bureau in

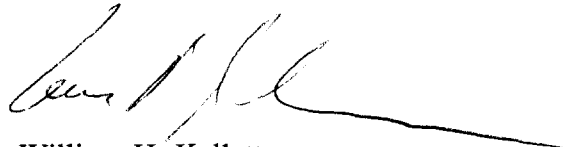
his answer to Interrogatory No. 4 to documents that Kay *knew* did not contain the information which the Bureau was seeking. Indeed, this is confirmed by Kay's later claim that he did not maintain the type of information sought by the Bureau. The only conclusion that can reasonably be drawn is that Kay intentionally set out to misinform the Bureau and send the Bureau on nothing more than a "wild goose chase."

9. Moreover, despite Kay's assertion that he is in fact fully capable of obtaining the specific station-by-station loading information that the Bureau has sought -- in itself an admission that Kay fully understood the nature of the Bureau's request -- Kay has never produced the subject information. Kay's pattern of noncompliance and gamesmanship during discovery -- including a failure to comply with a direct order of the Presiding Judge -- is contemptuous and abusive. No party should be permitted to engage in behavior at trial that is deceitful and disruptive. Kay's actions were intended to impede and frustrate the Bureau's ability to obtain relevant evidence, meet its burdens, and prosecute its case. At the very least, given the impact that such misconduct would surely have on Kay's basic character qualifications to be and remain a licensee, the matters raised herein warrant full and complete exploration at hearing.

10. According. the Bureau requests the Presiding Judge to add the following issues,  
with all burdens to be placed on the Bureau:

- (a) To determine whether James A. Kay, Jr. misrepresented material facts to the Commission or lacked candor during the discovery phase of the hearing proceeding in WT Docket No. 94-147.
- (b) To determine whether James A. Kay, Jr. abused the Commission's discovery processes during the hearing proceeding in WT Docket No. 94-147.
- (c) To determine, based on the evidence adduced pursuant to the foregoing issues, whether Kay is basically qualified to be and remain a Commission licensee.

Respectfully submitted,  
Michele C. Farquhar  
Chief, Wireless Telecommunications Bureau



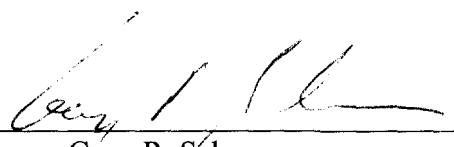
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March 19, 1997

Affidavit

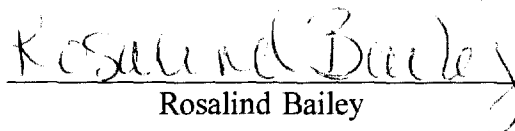
I, Gary P. Schonman, an attorney in the Wireless Telecommunications Bureau, hereby state that I have read the foregoing Wireless Telecommunications Bureau's Motion to Enlarge Issues and the facts stated therein are true and correct to the best of my knowledge and belief.

  
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Gary P. Schonman 3/19/97

## CERTIFICATE OF SERVICE

I, Rosalind Bailey, a secretary in the Enforcement Division, Wireless Telecommunications Bureau, certify that I have, on this 19th day of March 1997, sent by regular First Class United States mail, copies of the foregoing "Wireless Telecommunications Bureau's Motion to Enlarge Issues" to:

Barry A. Friedman, Esq.  
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Washington, D.C. 20036  
(Counsel for James A. Kay, Jr.)

  
Rosalind Bailey